SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 879

LEO HENZEL, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI

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Petitioner respectfully moves this Court to grant rehearing of its order of February 24, 1969, denying his petition for a writ of certiorari to review his criminal conviction in the Florida state courts.

This conviction was obtained after a trial in which petitioner was unavoidably absent during one of the two days of testimony against him because he was stranded in New York City by an airline strike. His trial counsel proceeded in his absence, and he was thereby deprived of the opportunity to confront two key witnesses against him.

Petitioner urged in his Petition for Certiorari that his conviction is invalid under the Due Process Clause of the Fourteenth Amendment on the ground that a criminal defendant in a state court has the constitutional right to be present at his own trial and confront his accusers unless he knowingly and intentionally waives that right. Petitioner maintained that, at the minimum, his conviction should be vacated and the case remanded to the Florida courts for a hearing whether he had knowingly and voluntarily waived his right to be present at his own trial.

In a decision officially reported on March 10, 1969, after certiorari was denied in this case, the United States Court of Appeals for the Second Circuit adopted an interpretation of a criminal defendant's due process right to be present at his own trial, and the principles governing waiver of this right, which is directly contrary to the views of the Florida courts in the present case. *United States* v. *Crutcher,* 405 F.2d 239 (2d Cir. 1968). The relevant facts of the two cases are strikingly analogous.

We respectfully direct the attention of this Court to the decision of the Second Circuit in *Crutcher.* We submit that, if the Second Circuit is correct in its view of what constitutes due process in this respect, the decision of the Florida courts in this case is plainly wrong and review should be granted to avert a grave injustice to petitioner and to establish an important constitutional principle.

The facts in *Crutcher were* these:

The defendant Payne was scheduled to go on trial in the federal court in Connecticut. Two days before his trial was to begin, he was arrested in New Jersey

on unrelated charges and gave a false name to the authorities there. When the trial began in Connecticut, Payne was still in New Jersey. His trial counsel in Connecticut agreed to proceed with the impanelling of the jury in his absence. Payne was brought to the trial the next day. The record showed no objection by Payne or his counsel to the impanelling of the jury in his absence, but also gave no indication that Payne was advised of or waived his right to be present.

In seeking to uphold Payne's conviction, the prosecution made three contentions, each of which was rejected by the Second Circuit:

(1) that Payne's giving of a false name to the authorities in New Jersey was a waiver of his right to be present at his trial in Connecticut;

(2) that Payne's trial counsel had waived Payne's right to be present at the impanelling of the jury; and

(3) that Payne's failure to object when he appeared at his trial in Connecticut and his silence thereafter were a waiver.

The Second Circuit held as to the first contention:

> "the giving of a false name, under the circumstances, could hardly constitute either a knowing or a voluntary waiver. [citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)]" 405 F.2d at 243.

The Second Circuit held as to the second contention:

> "[Payne's trial counsel] would not have the ability to bind Payne to a decision of this type without obtaining Payne's consent." *Id.*

The Second Circuit held as to the third contention:

> "there is nothing in the record from which we can infer that Payne was advised of his rights under Rule 43 and that he knowingly and voluntarily agreed to proceed with the jury that had been impanelled. [citation omitted] On the other hand, if Payne's counsel did discuss this point with him and he agreed to proceed with the jury that had been selected, waiver may be found. . . . Therefore we hold that a remand will be necessary as to Payne to determine the question of understanding waiver . . . unless the Trial Court determines after a hearing on remand, in accordance with this opinion, that Payne has made a knowing waiver of his right to be present during the impanelling of the jury, a new trial must be granted as to him." 405 F.2d at 243-44.

The Florida District Court of Appeal in the present case relied for its conclusion of waiver on each of the grounds specifically rejected by the Second Circuit in *Crutcher*. The Florida court held that:

> "the defendant voluntarily removed himself from the jurisdictional limits of the court a scant three days prior to the continuation of his trial, as there had been a hearing scheduled for July 10, which hearing was postponed. His inability to return does not alter the fact that he left voluntarily." Petition for Certiorari, pp. 2a-3a.

The Florida court also relied on the action of petitioner's trial counsel in specifically waiving petitioner's presence. *Id.* p. 2a. And it further held that his failure to object to the taking of testimony in his absence when the next trial session was held almost four months later was a waiver of the point. *Id.* p. 3a.

If Payne's arrest in New Jersey and his giving of a false name to the authorities there could not constitute a knowing or voluntary waiver of his right to be present at his trial in Connecticut, it is impossible to see how petitioner's leaving Florida and then being stranded in New York City by the airline strike could be held a waiver of his right. The record in this case makes unmistakably clear that petitioner had every right and reason to be in New York City during the recess in his trial and that his trip there in no way represented a decision to absent himself from his own trial. He was free on bond. He lived in New York City. He was engaged in business activities there. Some of the witnesses for his defense were there. His affidavit in the court below states that he was not even aware that there would be a trial session on the day he was stranded in New York.

If Payne could not be bound without his consent by his trial counsel's agreement to proceed in his absence, petitioner could not either. His trial counsel made no representation that he had secured petitioner's consent. The trial court itself recognized that it would be necessary to secure his consent on the record, but no effort was ever made to do so. His affidavit in the court below states that he never authorized, consented to, or acquiesced in his trial counsel's action.

If Payne's failure to object and subsequent silence could not be a waiver in the absence of a showing that he was advised of his right to be present or discussed the point with his trial counsel, neither could petitioner's failure to object when his trial resumed almost four months later. There is nothing in the record to show that petitioner was ever advised by either the

trial court or his trial counsel of his right to be present or his right to waive his personal presence. His affidavit in the court below states that he was unaware until after his conviction that the testimony of his accusers was taken in his absence.

At the very least, therefore, if *Crutcher* was correctly decided, petitioner is entitled to have his conviction vacated and the case remanded for a hearing whether he ever made a knowing and voluntary waiver of his right to be present at his own trial. This procedure has been followed by this Court in other cases involving the question of waiver of a federal constitutional right by a state criminal defendant. See *Henry* v. *Mississippi*, 379 U.S. 443, 450-52 (1965).

CONCLUSION

For the foregoing reasons, this Court should grant rehearing of its order of February 24, 1969, denying the Petition for Certiorari in this case, and should grant the Petition.

Respectfully submitted,

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Certification

I certify that the accompanying Petition for Rehearing of this Court's Order of February 24, 1969, denying the Petition for Certiorari in this case, is limited to the grounds set forth in Rule 58 of this Court, that it is presented in good faith, and is not for delay.

DANIEL A. REZNECK
Attorney for Petitioner